Nos. 78-569 and 78-5522

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN PATTON, a/k/a BUNCIE, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK DATTALO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment orders of the court of appeals (Patton Pet. App. A; Dattalo Pet. App. A) are not reported.

JURISDICTION

The judgments of the court of appeals were entered on August 7, 1978 (Patton) and August 8, 1978 (Dattalo). Petitions for rehearing were denied on September 5, 1978 (Patton Pet. App. B; Dattalo Pet. App. B). The petition for a writ of certiorari in No. 78-5522 was filed on October 4, 1978, and the petition in No. 78-569 was filed on October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court should have granted a mistrial or struck the testimony of two government witnesses because the witnesses' grand jury testimony was inadvertently withheld from the defense until after the completion of their testimony.

2. Whether the district court should have struck the testimony of a government witness because DEA agents, acting pursuant to routine DEA procedures, destroyed tape recordings of pretrial interviews with the witness.

3. Whether the district court should have declared a mistrial due to remarks in the prosecutor's closing argument.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. 846. In addition, each petitioner was convicted on two counts of distribution of heroin, in violation of 21 U.S.C. 841

(a)(1), and petitioner Dattalo was convicted on three counts of knowing use of a communication facility (a telephone) in facilitating the distribution of heroin, in violation of 21 U.S.C. 843(b).[1] Petitioner Patton was sentenced to concurrent terms of 15 years' imprisonment followed by three years' special parole. Petitioner Dattalo was sentenced to concurrent terms of 12 years' imprisonment on the conspiracy and distribution counts and four years' imprisonment on the telephone counts, followed by three years' special parole. The court of appeals affirmed by judgment orders (Patton Pet. App. A; Dattalo Pet. App. A).

The evidence adduced at trial showed that from about February 1975 to September 1976, petitioner Dattalo, co-defendant DeMarco, and co-conspirators Charles Kellington and Leonard Schumpert were partners in a heroin distribution ring in the Pittsburgh area (Tr. 232, 407). In the first week of September 1975, Hozie Wiggins, a long-time drug dealer who often assisted the group in putting together deals (Tr. 407), helped deliver two "balloons" (*i.e.*, prophylactics) of heroin from petitioner Dattalo and DeMarco to co-conspirator Martel Inmon (Tr. 413-414). Two weeks later Wiggins assisted DeMarco and petitioner Dattalo in delivery of two more ounces of heroin to Inmon (Tr. 417-418). The next week Wiggins personally delivered to co-defendant Sterling

[1] Co-defendant Frank Armocida was also convicted on two counts of distribution of heroin. He was sentenced to concurrent terms of five years' imprisonment, which was suspended, and placed on probation. Co-defendants Sterling Chapple and Joseph DeMarco were acquitted.

Chapple about $4,000 worth of heroin he had received from Kellington and Schumpert (Tr. 422-423). In early October Wiggins made another delivery through the same channels (Tr. 427-428).

In December 1975, Wiggins obtained one-half ounce of heroin from another distributor, petitioner Patton (Tr. 430-431). Before he could "cut" the heroin for street sale, however, Wiggins was arrested by Pittsburgh police (Tr. 432-433). In return for immunity from prosecution, he agreed to assist the government's investigation into the conspiracy (Tr. 434). Serving in an undercover capacity, Wiggins arranged a number of controlled buys from petitioner Patton. On January 20, 1976, he negotiated with Patton by telephone to purchase heroin and completed a purchase of $1,500 worth of the drug two days later (Tr. 529). On January 28, Wiggins again contacted petitioner Patton to buy two ounces of heroin, and the purchase was made three days later from Patton and Armocida (Tr. 531-533). Each telephone conversation was recorded, and the controlled purchases were made with government money and under DEA surveillance, with the drug eventually recovered for testing (Tr. 478-528, 535-538, 529, 531, 534). Wiggins testified that Schumpert had told him that the group's heroin supplier was petitioner Patton (Tr. 407-410). Petitioner Patton, in turn, told Wiggins that he had supplied petitioner Dattalo and Schumpert with 40 ounces of heroin for which he remained unpaid.[2]

[2] This connection between Patton and Dattalo was further confirmed by a conversation that DEA Agent Weatherbee overheard between the two men in a restaurant. After first discussing their various customers, including Wiggins, petitioner Dattalo arranged to receive another supply of drugs from petitioner Patton (Tr. 1280-1293).

Archie Patrick, another long-time drug dealer, was arrested by Pittsburgh police on February 20, 1974, on charges of attempted distribution of heroin. Like Wiggins, Patrick also agreed to cooperate with the authorities in their narcotics investigation (Tr. 1884). He then made a series of controlled buys of from one-half to two ounces of heroin from Inmon (Tr. 1893, 1910, 1935, 1973, 1989, 2003-2004, 2030-2032). Each purchase began with a recorded telephone conversation and was witnessed by DEA surveillance agents (Tr. 1897-1910, 1922-1956, 1960-2045, 2362-2571). Court-authorized wiretaps of petitioner Dattalo's and Inmon's telephones revealed that Inmon would contact Dattalo when he needed heroin, would receive his order, and would pass the drugs on to his customers, including Patrick (Tr. 2771, 2774, 2814, 2865-2867).

ARGUMENT

1. Petitioners contend (Patton Pet. 7; Dattalo Pet. 10-11) that the district court erred in failing to grant a mistrial or to strike the testimony of government agents whose grand jury testimony was not turned over to the defense until after completion of the government's case-in-chief.

Prior to trial the government agreed to provide petitioners with any Jencks Act materials 24 hours

in advance of a witness's testimony (Tr. 553). As the trial progressed petitioners claimed that they were entitled to the grand jury testimony of each witness the government called. Finally, the trial judge ordered the government to turn over all of the grand jury transcripts for the court's review (Tr. 575, 793). See *Palermo* v. *United States*, 360 U.S. 343, 354 (1959); 18 U.S.C. 3500(c). During presentation of the government's evidence, the judge released portions of the grand jury transcript of the government witness then testifying. Through an inadvertent error, however, the district court failed to turn over the testimony of DEA Agents Richard Weatherbee and Roy Upton, who had conducted parts of the narcotics surveillance and had dealt with and debriefed the informants, until after the government had rested its case.

When the error was discovered, petitioners moved for a mistrial, contending that their cross-examination of the agents had been impaired by the absence of their prior testimony (Tr. 3035, 3120-3125).[3] In response the district court offered, and the government agreed, to allow the government's case to be reopened so that the agents could be cross-examined further (Tr. 3079-3100). Petitioners declined this offer (Tr. 3128, 3132).

[3] There is some indication that defense counsel were not totally unaware that the agents had appeared before the grand jury. Petitioner Patton's attorney had been alerted by the government to the agents' appearance but apparently failed to request their testimony (Tr. 3039-3040).

The district court correctly refused to grant a mistrial or to strike the agents' testimony. In the first place, Agent Upton's testimony before the grand jury was not related to the subject matter of his direct testimony at petitioners' trial (Tr. 3126), and it therefore did not qualify as Jencks Act material. See 18 U.S.C. 3500(b). Moreover, the failure to provide the testimony was inadvertent—indeed, was as much the fault of the trial judge as the government—and could easily have been avoided if petitioners had put the court on notice that they had not received the agents' grand jury testimony. Finally, the violation could have been remedied by the reopening of the government's case, without any demonstrated adverse effect on petitioners, yet they chose not to avail themselves of that opportunity. See *United States* v. *D'Angiolillo*, 340 F.2d 453, 457 (2d Cir.), cert. denied, 380 U.S. 955 (1965).[4]

[4] The decision below does not conflict with the Third Circuit's prior decisions in *United States* v. *Prince*, 264 F.2d 850 (1959), and *United States* v. *Clark*, 346 F. Supp. 428 (E.D. Pa. 1972), aff'd, 475 F.2d 1396 (1973). In *Prince*, the government's failure to produce an agent's report was not discovered until a hearing on the defendant's motion to appeal *in forma pauperis*, rather than during the trial. In *Clark*, the government inadvertently failed to supply the defense with identification sheets prepared by government witnesses at a pretrial lineup. Two days into the trial the government noticed the error and the court, recognizing the need for additional cross-examination, offered to reopen the case so that the lineup witnesses could be recalled. Although the government agreed to this procedure, the defendant objected, and the court declared a mistrial. However, this ruling does not suggest that a mistrial is invariably required in such circum-

In addition, while petitioners may have lacked Agent Weatherbee's grand jury testimony during their cross-examination of the agent, they had other materials that covered in even greater detail what he had told the grand jury. These included the agent's reports (DEA-6 forms), the grand jury testimony of the informants he had debriefed, and other statements made to him by the informants (Tr. 3119). This information provided petitioners with an adequate basis upon which to cross-examine Agent Weatherbee. Indeed, petitioners do not suggest how they were prejudiced by the belated production of the agent's grand jury testimony. See *Killian* v. *United States*, 368 U.S. 231, 243-244 (1961); *United States* v. *Rivero*, 554 F.2d 213, 215 (5th Cir. 1977).

2. Petitioners contend (Patton Pet. 5-6, 7; Dattalo Pet. 6-7, 10-11) that the district court should have stricken the testimony of Archie Patrick because the tape recordings of his debriefings with DEA agents were destroyed in good faith prior to trial pursuant to routine DEA procedures. In *United States* v. *Vella*, 562 F.2d 275, 276 (3d Cir. 1977), cert. denied, 434 U.S. 1074 (1978), the Third Circuit held that rough interview notes of FBI agents, to which these tape recordings are equivalent (*United States* v. *Carrillo*, 561 F.2d 1125, 1129 (5th Cir.

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stances or that the judge would have abused his discretion in either recalling the witnesses over the defendant's objection or, as here, proceeding with the trial after the offer to reopen had been rejected.

1977)), should be preserved so that the district court can later determine whether the notes should be made available to a defendant. At the time of the destruction of the recordings here, however, and indeed even at the time of petitioners' trial, the law in the Third Circuit did not require the preservation and production of rough interview notes. See *United States* v. *Niederberger*, 580 F.2d 63, 71 n.12 (3d Cir. 1978), cert. denied, No. 78-234 (Nov. 27, 1978). The courts of appeals that now require the preservation of such notes uniformly agree that this rule should not be applied retroactively, especially where, as in this case, there is no suggestion that the destruction was in bad faith or that it prejudiced the defense.[6] See *United States* v. *Vella*, *supra*; *United States* v. *Robinson*, 546 F.2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977); *United States* v. *Harrison*, 524 F.2d 421, 434-435 (D.C. Cir. 1975). See also *United States* v. *Augenblick*, 393 U.S. 348 (1969).[6]

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[5] The Drug Enforcement Administration has changed its procedures and now retains rough interview notes (Tr. 226). Accordingly, the issue presented here—which the Court has declined to review on several prior occasions (see, *e.g.*, *Mehta* v. *United States*, cert. denied, 434 U.S. 965 (1977); *Stebbins* v. *United States*, cert. denied, 434 U.S. 938 (1977))—is of little continuing importance.

[6] The statements prepared from the tapes were available to petitioners at trial. Furthermore, Patrick's trial testimony was almost totally corroborated by other evidence, including tape recorded telephone conversations and testimony by DEA agents who had witnessed the drug transactions. Indeed,

3. Petitioners' final contention (Patton Pet. 6-7; Dattalo Pet. 8, 11) is that the district court should have granted a mistrial based on the following comment of the prosecutor during the government's rebuttal argument to the jury:

> Ladies and gentlemen, let me suggest, that if justice isn't done in this case, if these people walk out without paying their due, there has been a swindle on this jury and on this system we all believe in.

We submit that petitioners were not prejudiced by this brief remark. The court gave the jury an appropriate cautionary instruction that the remarks of counsel are not evidence, and the proof of petitioners' guilt was overwhelming. Moreover, the statement, while perhaps not to be approved, was an isolated comment made at the end of an eight-week trial. The district court did not abuse its discretion in refusing to grant a mistrial. See *United States* v. *Lewis*, 547 F.2d 1030, 1037 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Shirley*, 435 F.2d 1076, 1079 (7th Cir. 1970); *United States* v. *Alloway*, 397 F.2d 105, 113 (6th Cir. 1968).

Patrick's testimony related primarily to his dealings with Inmon, rather than petitioners, and petitioners did not dispute Patrick's version of these events.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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